Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JERRY LOKAY, Petitioner,

v.

AMERICAN REAL ESTATE CORPORATION,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH COURT OF APPEALS DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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May, 1994

QUESTIONS PRESENTED

1. Whether, the automatic exclusion of relevant eyewitness testimony pursuant to a state court rule of procedure violates the Due Process Clause of the Fourteenth Amendment by depriving a litigant of a meaningful opportunity to be heard, particularly where all parties had full prior knowledge of the testimony to be presented at trial.

2. Whether the hearing on the good cause exception to the automatic exclusion rule adequately satisfies the requirements of the Due Process Clause.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, Jerry Lokay, and respondent to this petition, American Real Estate Corporation, a Texas corporation with its principal place of business in Beaumont, Texas. So far as petitioner knows, American Real Estate Corporation has no subsidiaries.

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OCTOBER TERM, 1993

JERRY LOKAY, Petitioner,

v.

AMERICAN REAL ESTATE CORPORATION,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH COURT OF APPEALS DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

Petitioner, Jerry Lokay, requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Court of Appeals District of Texas entered in this action

on July 1, 1993, which affirmed a final judgment of the District Court of Jefferson County, Texas 172nd Judicial District.

OPINIONS BELOW

The opinion of the court of appeals was not published, but is reproduced at appendix, pages A-3 -- A-18. Application for writ of error was filed in the Supreme Court of Texas, but was denied initially and on rehearing. Notices of the denial by the Supreme Court of Texas are reproduced in the appendix, pages A--18-22. The judgment of the 172nd judicial district court was not published, but is reproduced in the appendix to this petition at pages A--23-26.

JURISDICTION

1. The opinion of the court of

timely motion for rehearing was denied on July 14, 1993.

2. Petitioner timely filed his application for writ of error with the Supreme Court of Texas which was denied on January 12, 1994. A timely motion for rehearing was denied on February 9, 1994.

3. Thus the court of appeals is the highest court of the State in which a decision could be had.

4. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Due Process Clause, U. S. Constitution, Amendment 14, Section 1: "...; nor shall any State deprive any person of life, liberty or property,

without due process of law; ..."

Rule 215(5), Texas Rules of Civil Procedure: "**Failure to Respond to or Supplement Discovery.** A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record."

STATEMENT OF THE CASE

Petitioner Lokay broke his neck in a single-vehicle accident while using the truck owned by American Real Estate Corporation ("AREC"). Lokay sought damages from AREC, claiming it was negligent in maintaining its truck. Prior to trial, Lokay deposed the only investigating officer, Trooper Cox, and the eye-witness, Mrs. Nixon. AREC cross-examined each witness.

Nevertheless, moments before jury selection, AREC filed its motion to exclude the witnesses on the ground that Lokay had not supplemented answers to interrogatories to name Trooper Cox and Mrs. Nixon as persons knowing relevant facts. On the basis of a procedural rule requiring automatic exclusion, the trial

court prohibited Lokay from mentioning or using the testimony of the only investigating officer and the eye-witness, Mrs. Nixon. *Rule 215(5), Tex. R. Civ. Proc.* Following jury selection the trial court conducted a "good cause" hearing, but denied Lokay the right to introduce testimony of Trooper Cox, the only witness who could describe the condition of the truck and how it contributed to the accident. Likewise, the trial court denied Lokay the right to introduce testimony of Mrs. Nixon, the eye-witness to the accident who could describe the accident and the low-speed of the vehicle at the time. Motions for continuance to supplement answers were denied, and trial immediately followed.

The truck had been sold for salvage.

Lokay had no opportunity to inspect it or have it tested before trial. The trial court excluded critical, eye-witness testimony. Without hearing the testimony of Trooper Cox that bald tires contributed to the accident and without hearing the testimony of Mrs. Nixon that the vehicle was going no more than 40 miles per hour, the jury found against Lokay, and the trial court entered judgment on the verdict.

Petitioner Lokay filed a motion for new trial in which he claimed that "the automatic exclusion of relevant testimony even though the party moving to exclude the evidence has full knowledge of the testimony to be presented, violates the United States Constitution, (7th Amendment)." *Plaintiff's Motion for New*

Trial, paragraph XIV. Lokay further claimed that "the non-discretionary application of the rules of procedure to totally exclude the sole testimony available to the Plaintiff upon a necessary issue in the case violates the Plaintiff's rights to have a jury trial and access to the courts under the provisions of the United States Constitution, (7th Amendment)." *Plaintiff's Motion for New Trial, paragraph XVI.* In his motion, petitioner Lokay requested a hearing on the motion for new trial, but none was scheduled and the motion was overruled by operation of Texas law. *Rule 329b, Tex. R. Civ. Proc.*

On appeal to the Ninth Court of Appeals, Lokay urged that the trial court committed error "because the automatic

exclusion of relevant testimony under Rule 215, Texas Rules of Civil Procedure violates plaintiff's right to due process of law as guaranteed by the United States Constitution and the Constitution of the State of Texas." *Brief for Appellant, point of error 7, before the Ninth Court of Appeals, Texas.* The Court of Appeals considered Lokay's contention that "the automatic exclusion of relevant testimony under Rule 215(5) violates state and federal constitutional due process." *Appendix, p. 15-16.* The Court of Appeals held that a good cause hearing adequately addressed the due process concerns, and that the application of Rule 215(5) was not unconstitutional as applied to this case because the automatic exclusion of the testimony of Trooper Cox and Mrs.

Nixon did not "adjudicate Lokay's claims or prevent him from presenting the claim to the jury." *Appendix, p. 16.*

In his timely filed application for writ of error in the Supreme Court of Texas, Petitioner Lokay again raised the point that his due process rights were denied by the automatic exclusion of relevant testimony. The Texas Supreme Court overruled his application for writ of error, and denied his motion for rehearing.

REASONS FOR GRANTING THE WRIT

I. THE AUTOMATIC EXCLUSION RULE [RULE 215(5), TEX. R. CIV. PROC.] AS APPLIED TO THIS CASE CONFLICTS WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Due Process Clause requires as a minimum that deprivation of life, liberty,

or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Armstrong v. Manzo, 380 U.S. 545, 550 (1965).* A fundamental requirement of due process is "the opportunity to be heard." It is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo, 380 U.S. at 552.*

Here, Petitioner was unduly penalized for the failure to timely supplement his answers to interrogatories. The identity of the witnesses Cox and Nixon was disclosed in a notice to take oral deposition filed approximately eight (8) months before trial. Respondent was represented by counsel during the deposition of both witnesses.

Respondent's counsel cross-examined both witnesses. On the very first day of trial just moments before jury selection petitioner's counsel was confronted by a motion in limine filed by opposing counsel. One of the purposes of this motion was to exclude the testimony of Cox and Nixon. The trial court ordered that the deposition testimony of both Cox and Nixon be excluded. (Tr. 49, 55). Petitioner made an oral motion for continuance which was denied and jury selection proceeded (SF pp. 9-10). Throughout the trial of this case, petitioner offered the excluded deposition testimony of Cox and Nixon and again urged the trial court to permit the introduction of their testimony. Petitioner renewed his motion for continuance, (SF 3-11; 52-

65; 125-142; 273; Tr. Vol 2 pp 174-204), offering to pay the costs related to the continuance. (SF 60). The trial court denied all of petitioner's motions and excluded the testimony of both witnesses.

Rule 215(5) of the Texas Rules of Civil Procedure states:

"**Failure to Respond to or Supplement Discovery**. A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record."

Accordingly, the failure to supplement discovery answers automatically results in a "loss of opportunity" to offer the undisclosed witness' testimony.

The only exception to this rule of automatic exclusion arises when the party who offers the testimony shows "good cause." *Morrow v. H. E. B. Inc., 714 S.W.2d 297 (Tex. 1986).*

> The rule [215(5)] is mandatory, and its sole sanction -- the exclusion of evidence -- is automatic, unless there is good cause to excuse its imposition. The good cause exception permits a trial court to excuse a failure to comply with discovery in difficult or impossible circumstances. The trial court has discretion to determine whether the offering party has met his burden of showing good cause to admit the testimony, but the trial court has no discretion to admit testimony excluded by the rule without a showing of good cause. *Alvarado*

v. Farah Mfg. Co., Inc., *830 S.W.2d 911, 914 (Tex. 1992)*. However, the Texas Supreme Court has admittedly imposed a very strict interpretation of good cause. *See* *Alvarado*, *830 S.W.2d at 915*. Inadvertence of counsel, lack of surprise, uniqueness of the excluded evidence, a fully deposed witness, etc. standing alone does not constitute "good cause." *Id.*

In fact, the Texas Supreme Court in *Alvarado*, *830 S.W.2d at 914* noted that in eight cases reviewed by the Court, the trial courts admitted testimony which had not been timely identified in response to discovery requests; in none of them did the Texas Supreme Court hold that "good cause sufficient to require admission" was shown. *Id.*

As stated by the Texas Supreme Court:

(830 S.W.2d at 915)

"To relax the good cause standard in Rule 215(5) would impair its purpose. Counsel should not be excused from the requirements of the rule without a strict showing of good cause. The difficulty with the rule lies not so much in the requirement of strict adherence, but in the severity of sanction it imposes for every breach... As written, however, Rule 215(5) prescribes a single sanction for failing to supplement discovery, and we are not free to disregard its plain language. Nor should we revise the rule by opinion..."

The Court should note that "good cause" has never been clearly defined by the Texas Supreme Court. Without such definition, one who must carry the burden of proving good cause is without effective notice of what he must prove.

Under the current Texas discovery rules, the sanction for failure is harsh: the trial court will not permit the disobedient party to introduce evidence of

an undisclosed expert witness or person having knowledge of relevant facts. In this case, the testimony of the "undisclosed" witnesses was essential for proof of crucial issues in this case. Accordingly, the sanction effectively worked an injustice and effectively harmed the presentation of the merits of petitioner's case. As stated by the authors of a recent law review article on the subject:

"Although it is unfair to require litigants to try cases without full knowledge of the opponent's facts, it appears more unfair to prevent any litigation of a dispute because of an inadvertent omission of a litigant's counsel. With the elevation of form over substance in discovery, courts have often overlooked the merits of the litigation and the right of the litigants. Under the current interpretation, courts may deny plaintiffs and defendants the opportunity to present testimony on a critical element of a claim or defense simply because their attorneys may have inadvertently failed to

follow the technical wording of the disclosure requirements. Courts should not dispose of litigation because it is the speedy or expedient thing to do; rather, courts should dispose of litigation when it is the just and right thing to do. It is not just and right for a litigant to be penalized by the most severe sanctions and to lose the opportunity for a trial on the merits simply because of a technical error or an excusable mistake of her counsel." *Holman and Keeling, "Disclosure of Witnesses in Texas: The Evolution and Application of Rules 166b(6) and 215(5) of the Texas Rules of Civil Procedure", 42* Baylor Law Review *405, 448 (1990).*

Here, petitioner lost the opportunity for a meaningful trial on the merits because of a technicality. Effectively, petitioner disclosed the identity of the two witnesses and the substance of their testimony eight (8) months prior to the date of trial. Yet, according to Texas law, this circumstance is not sufficient to constitute "good cause." *See* Sharp v. Broadway Natl. Bank, *784 S.W.2d 669 (Tex.*

1990) (per curiam).

This Court has recognized that there are "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale v. Rogers, 357 U.S. 197, 209-210 (1958).* Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hinderance of the discovery process justifies a presumption that its claims or defenses lack merit. *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 705-706 (1982).* The imposition of the exclusion sanction was clearly arbitrary and excessive in this case. As applied to

this case, the automatic exclusion rule deprived petitioner of a meaningful trial. Petitioner's burden of proof under Texas law was two-fold: 1) to prove that respondent should have known of the defective condition of the truck at the time of the accident in question and; 2) to show that he was not contributorily negligent with respect to the accident through use of excessive speed. *See Sturtevant v. Pagel, 134 Tex. 46, 130 S.W.2d 1017 (1939).* In order to satisfy this burden, Petitioner needed the testimony of Texas Department of Public Safety Trooper Cox to prove the defective condition of the truck at the time of the accident and the testimony of Mrs. Nixon to show the road conditions at the time of the accident and the relative speed of

Petitioner's vehicle. The exclusion of this testimony means that no evidence or factually insufficient evidence exists to support the jury's verdict if the verdict had been in petitioner's favor. *Carr v. Norstock Building Systems, 767 S.W.2d 936, 942 (Tex. App - Beaumont 1989, no writ).*

Accordingly, the operation of the automatic exclusion rule in this case deprived Petitioner of a meaningful trial in violation of the Due Process Clause of the Fourteenth Amendment. Further, the Texas Supreme Court's failure to clearly define "good cause" has led to a number of inconsistent and unjust results. It cannot satisfy Due Process.

II. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH

HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The Court of Appeals considered petitioner's contention that the automatic exclusion of relevant testimony violated federal constitutional due process *(Appendix 7)*. However, the Court of Appeals held that Rule 215(5) was not unconstitutional as applied to this case because the application of the automatic exclusion rule did not effectively adjudicate petitioner's claims or prevent him from presenting his claim to a jury. *(Appendix 7)*.

The Court of Appeals' ruling is clearly wrong. If petitioner was deprived of a meaningful trial through exclusion of critical eyewitness testimony, the sanction worked as an effective loss of

petitioner's case on the merits. The fact that petitioner was permitted to go to a jury means nothing in the absence of evidence sufficient to sustain a verdict in petitioner's favor. If the Court of Appeals' holding is allowed to stand, it will undermine fundamental fairness in the litigation process which the Due Process Clause of the Fourteenth Amendment protects.

Use of unduly harsh discovery sanctions presents a grave challenge to the integrity of our system of civil justice in the United States. Cases should be decided on their merits, not on the basis of a "technicality." This circumstance is particularly true when the problem resides in Texas, the second most populous state in the Union. For this

reason, Petitioner submits that this case presents a question of public importance which merits plenary review by this Court.

The entry of a take-nothing judgment against petitioner had important consequences. Petitioner suffered serious bodily injuries for which he received no compensation. The exclusion of critical eye-witness testimony deprived petitioner of "his day in Court." Petitioner lost the opportunity to be heard in a meaningful manner. This issue has not been settled by any prior decision of this Court. This Court is the final and best arbiter of the Constitution and should settle the question.

III. THE ERRONEOUS EXCLUSION OF THE TESTIMONY OF THE INVESTIGATING OFFICER AND

THE EYEWITNESS DEPRIVED PETITIONER OF A MEANINGFUL TRIAL.

Lokay's claim required proof that there was a defect in the equipment or condition of the truck. *Houston Transit Company v. Steele, 324 S.W.2d 912 (Tex. App. - Waco, 1959) ref. n.r.e.* Trooper Cox's testimony was critical to prove the condition of the truck at the time of the accident. Cox saw the truck immediately after the accident. It was upside down. He saw the tires. They were slick. (SF 125-126). He said they were a factor in causing the accident. (SF 129-130).

Respondent claimed that petitioner was speeding and that under comparative negligence rules AREC would not be liable. Mrs. Nixon's testimony was crucial to disprove AREC's claim that Lokay was

speeding. The speed limit on the highway was 55 miles per hour. (SF 130). Mrs. Nixon stated the speed of the vehicles was not over 40 miles per hour. (SF 133).

Both Cox and Nixon were crucial to prove Lokay's claim, but they were never heard. Lokay was denied a meaningful trial because "the excluded testimony was highly relevant to a critical issue..." *Green v. Georgia, 442 U.S. 95, 97 (1979).*

Excluding Lokay's witnesses was arbitrary. The purpose of discovery is to provide the parties with the fullest knowledge of the facts before trial. This had been fully accomplished. Respondent cross-examined both Cox and Nixon long before trial. Lokay offered only their deposition testimony. It would not vary at trial.

However, Lokay was left with no evidence sufficient to prove his claim of the defective condition of the truck. He could not testify about the defective condition because after the accident he was face-down in the dirt, still in the truck. (SF 227). The AREC representatives did not see the truck after the accident. There was no log sheet listing use of the truck, and no inventory or record listing reports of needed repairs (SF 87-88, 103-104). No mileage records were kept (SF 114-115) and the only copy of a receipt for any repair was a receipt for purchase of two tires (SF 91-92, 107). Lokay could not inspect the truck after the accident because it was sold for salvage. (SF 102, 123).

Lokay's witnesses were silenced by

court order. Without Cox and Nixon, petitioner's case died a slow, agonizing death.

No one claimed that Lokay wilfully sought to avoid discovery. Lokay's omission was not filing a supplement naming Cox and Nixon as persons with knowledge of facts, the same information Lokay had already given respondent. There was no order requiring the parties to list their trial witnesses. Respondent made no such request.

It is axiomatic that witnesses are required to prove a claim in court. Lokay was denied a meaningful trial because Texas courts have neglected that "in final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial

of a party's fair day in court except upon a serious showing of willful default." *Gill v. Stolow, 240 F.2d 669, 670 (2nd Cir., 1957).*

CONCLUSION

Petitioner has been deprived of a meaningful opportunity to be heard in this case. This right without question is a valuable one. Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense on the merits. *Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 86-87 (1988).* "Only wiping the slate clean ... would have restored the petitioner to the position he would

have occupied had due process of law been accorded to him in the first place." Petitioner deserves a new trial. The Due Process Clause demands no less in this case. *Id.*

Certiorari should be granted.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH COURT OF APPEALS DISTRICT OF TEXAS

APPENDIX

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May, 1994

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Opinion, Court of Appeals for the Ninth Court of Appeals District of Texas

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-92-250 CV

JERRY LOKAY, Appellant

V.

AMERICAN REAL ESTATE CORPORATION, Appellee

On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-134,709

O P I N I O N

Jerry Lokay was involved in a single-vehicle accident while driving a truck owned by American Real Estate Corporation. His passenger, Sandra Caraway, initiated

the suit against both American and Lokay, but settled with both parties prior to trial. Lokay filed a cross-claim against American, alleging American failed to properly maintain the vehicle. The jury found Lokay was negligent and American was not negligent. Lokay raises seven points of error.

The first four points of error challenge the exclusion of deposition testimony at trial. The depositions of investigating officer Ross Cox, Sr., and eyewitness M.L. Nixon were excluded because they were not identified by name, address and subject matter in response or supplement to interrogatories requesting such information for all person having knowledge or relevant facts. The pertinent interrogatory and Lokay's

response stated:

16. Please state the names and addresses of all persons known by you or your attorneys to have knowledge of any facts relevant to the matters or incidents complained of in your suit together with a brief description of the nature and source of such person's knowledge.

ANSWER: Sandra Lokay, Jerry Lokay; They were in the wreck; Investigating officers, ambulance personnel and wrecker, Travelers Insurance adjuster; American Real Estate; Treating physicians; Joe Caraway; Jodie Caraway; Juanita Dorothy Rheel; Brenda Arena; Judy Hargrove; Bill Christian; Gerard Farhah; Louis Millicent.

Lokay's response was mailed December 5, 1990. On September 12, 1991, Lokay mailed American notices to take the oral depositions of both Cox and Nixon. The notices listed the deponent's address. Both Cox and Nixon were deposed September 19, 1991, eight months before trial. Each expressed knowledge of relevant facts.

A party is under a duty to reasonably supplement his response to discovery if he obtains information upon the basis of which he knows the response was incorrect or incomplete when made, or if he knows that the response though correct when made is no longer true and complete and the circumstances are such that failure to amend is in substance misleading. TEX. R. Civ. P. 166b (6).

> A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must

be shown in the record.

TEX. R. Civ. P. 215(5).

The sanction for failing to comply is automatic exclusion of the undisclosed witness's testimony. *Morrow v. H.E.B., Inc., 714 S.W.2d 297(Tex.1986).* Determination of good cause is within the trial court's discretion and will only be set aside upon a showing of an abuse of discretion. *Id. at 298.*

Point of error one urges Cox's testimony that he observed bald tires on the truck should have been admitted because Cox wad identified as a party with knowledge of relevant facts in answers to interrogatories and because Cox was identified in a notice to take oral deposition more than thirty days before trial. Point of error two makes the same

challenge regarding Officer Cox's deposition testimony that slick tires on the truck were a factor in causing the accident. Lokay directs points of error three to the exclusion of the deposition testimony of eyewitness M.L. Nixon. Lokay argues the response "investigating officers" sufficient identified Cox, and the deposition notices provided an adequate alternative means of supplementing the interrogatory response as to both witnesses. We disagree. Those cases involving undisclosed witnesses actually known to the opposing party through deposition have been reviewed under the "good cause" exception to Rule 215(5). See *Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911 (Tex. 1992); *Sharp v. Broadway Nat. Bank*, 784 S.W.2d 669 (Tex.

1990); *Thompson v. Kawasaki Motors Corp., U.S.A.*, 824 S.W.2d 212 (Tex. App.--Dallas 1991, no writ); *Durish v. Panan Intern., N.V.*, 808 S.W.2d 175 (Tex. App.--Houston [14th Dist.] 1991, no writ); *Stiles v. Royal Ins. Co. of America*, 798 S.W.2d 591 (Tex. App.--Dallas 1990, writ denied); *Gonzalez v. Stevenson*, 791 S.W.2d 250 (Tex. App.--Corpus Christi 1990, no writ). We see no rational basis for deviating from the analysis employed in these cases, as it avoids the possibility that a party will bury a witness beneath a mountain of discovery material, yet permits a trial court to take the opposing party's actual knowledge into account. The trial court found that Lokay failed to timely supplement his response. The record supports that finding. Points of error

one through three are overruled.

Point of error four maintains the court erred in excluding the testimony because American stipulated that the depositions could be used a trial. Lokay refers to the standard stipulation, which reads:

> It is further stipulated and agreed that this deposition, or any part of same, may be used upon the trial of this cause with the same force and effect as if the witness were present in court and testifying in person.

We agree with American that this stipulation merely provides that the deposition may be used in place of live testimony, but that it does not serve as a waiver of objections to the admissibility of the deposition, as demonstrated by another of the stipulations:

> It is further stipulated and agreed that all objections are hereby preserved, except to the form of the question and responsiveness of the answer, and may be made at the time any testimony herein is sought to be offered upon the trial of this cause.

We hold that American did not waive its objections to the admission of the depositions by virtue of the stipulation. Point of error four is overruled.

Point of error five contends the trial court abused its discretion in excluding Cox's and Nixon's depositions because Lokay "established good cause for supplementing answers to interrogatories to give names and addresses of the two witnesses and for use of their testimony at trial." Lokay argues that he established good cause, in that (1) American had received the names and

addresses of the witnesses, and the nature of their knowledge, well before trial; (2) both witnesses were deposed and only their deposition testimony was offered; (3) the testimony was not merely cumulative of other testimony. The "good cause" exception to the general exclusionary rule is discussed at length in *Sharp* and more recently in *Alvarado* and *Smith v. Southwest Feed Yards*, 835 S.W.2d. 89 (Tex. 1992). The fact that a witness has been deposed does not <u>in itself</u> constitute good cause. *Sharp*, 784 S.W.2d at 671; *Smith*, 835 S.W.2d at 91; *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 162 (Tex. 1992). Other factors may combine with that factor to satisfy the good cause requirement. In *Smith*, the Supreme Court found an abuse of discretion in excluding the testimony of a

deposed witness who was the only individual named party in the suit.

Lokay identifies the factors he presented to the trial court. Lokay, Cox, and Nixon were the only people "whose names and addresses [were] supplied to defendant who had any knowledge of what happened in the accident." The interrogatory response named "investigating officers" as persons with knowledge of relevant facts. Ms. Nixon was an eyewitness to the accident. The witnesses were identified by name and address eight months before trial. Only their deposition testimony was offered; American knew precisely what that testimony would be. American was obviously not surprised by the testimony, as it filed a motion to exclude the

testimony before it was offered. On the other hand, the response was woefully incomplete, and Lokay does not suggest that he was unable to properly comply with the request. The issue before us is not whether the trial court's decision was correct, but whether the decision was made without reference to any guiding rules or principals. *Morrow,* 714 S.W.2d at 298. In *Smith* and *Bynum,* in preparing for trial no reasonable mind could have failed to anticipate that the sole individual party would testify. Here, although it appears that American anticipated the unnamed witnesses might be called to testify and prepared the case with a mind toward foreclosing that possibility, we cannot say that the combined force of Lokay's factors is so great that trial court

abused its discretion in excluding the testimony. Point of error five is overruled.

Point of error six urges the trial court abused its discretion in denying Lokay's motion for a continuance. Lokay cites *TransAmerican Natural Gas v. Powell*, 811 S.W.2d 913 (Tex. 1991), for the proposition that the trial court should have granted Lokay's motion for continuance and imposed a lesser, monetary sanction to compensate for the delay. Such a continuance would have given Lokay the time to properly supplement his responses. *Alvarado*, 830 S.W.2d at 915. We are aware that the Amarillo Court of Appeals recently found an abuse of discretion by the trial court in a very similar situation. *Johnson v. Berg*, 848

S.W.2d 345 (Tex. App.--Amarillo, no writ). The witness in *Johnson* was deposed six months before trial. A letter expressed the intent that the deposition was to be taken because the witness could not testify at trial. In *Johnson*, exclusion of the expert's testimony resulted in a directed verdict; here, the witnesses were certainly material but their exclusion did not preclude Lokay from presenting his case. Rule 215(5) provides for the automatic exclusion of witnesses in the absence of good cause. The Amarillo court found that Johnson demonstrated good cause and that the record did not support the sanction imposed. In this case, it certainly would have been within the discretion of the court to grant such a continuance and impose sanctions upon

Lokay for the delay, had the trial court found good cause for the failure to supplement. The facts in this case do not merit vacating the trial court's finding that good cause did not exist. Therefore, we do not reach the *TransAmerican* balancing test and the automatic exclusion rule applies. Point of error six is overruled.

Point of error seven contends the automatic exclusion of relevant testimony under Rule 215(5) violates state and federal constitutional due process. Lokay's due process concerns were adequately addressed in the hearing because he had an opportunity to establish good cause for not applying the Rule 215(5) sanction. Unfortunately, he failed to do so to the satisfaction of the trial

court. Nor can we say that the imposition of the sanction in this case amounted to a "death penalty." *See Remington Arms Co., v. Caldwell,* 850 S.W.2d 157, 171 (Tex. 1993). Rule 215(5) is not unconstitutional as applied to this case because application of the automatic exclusion rule did not effectively adjudicate Lokay's claims or prevent him from presenting his claim to the jury. Point of error seven is overruled. The judgment is affirmed.

AFFIRMED

PER CURIAM

Opinion Delivered
July 1, 1993
Do not Publish

Before Walker, C.J., Brookshire and Burgess, JJ.

Notice of Denial of Application for Writ of Error, Texas Supreme Court

THE SUPREME COURT OF TEXAS
P. O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 12, 1994

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RE: Case No. D-4038
Style: JERRY LOKAY
v. AMERICAN REAL ESTATE CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas

denied the above referenced application for writ of error with the notation, "Writ Denied."

Respectfully yours,

JOHN T. ADAMS, CLERK

Notice of overruling motion for rehearing Texas Supreme Court

THE SUPREME COURT OF TEXAS
P. O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 12, 1994

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RE: Case No. D-4038
Style: JERRY LOKAY
v. AMERICAN REAL ESTATE CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of

error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

Judgment, trial court, 172nd Judicial District of Texas

E-134,709

JERRY LOKAY	IN THE DISTRICT COURT OF
v.	JEFFERSON COUNTY, TEXAS
AMERICAN REAL ESTATE CORPORATION	172ND JUDICIAL DISTRICT

JUDGMENT

On the 18th day of May, 1992, came on to be heard the above-entitled and numbered cause and Plaintiff, Jerry Lokay, appeared in person and by attorney of record. Plaintiff requested a continuance of thirty days and offered to pay Defendant costs occasioned by such delay, and the Court denied Plaintiff's request for continuance. American Real Estate Corporation, the Defendant, appeared by its representatives and by attorney of

record and announced ready for trial and a jury having been previously demanded, a jury consisting of twelve jurors was duly empaneled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the case to the jury of Jury Questions. Following due deliberation, the jury returned its unanimous verdict, which verdict included in part, the following finding in answer to Jury Question No. 1 pertaining to liability:

Question No. 1

Did the negligence, if any, of those named below proximately cause the occurrence in question?

Answer "Yes" or "No" for each of the following"

(A) American Real Estate Corporation **NO**

(B) Jerry Lokay **YES**

The charge of the Court, including the Jury Questions, and the verdict of the jury, are each incorporated herein by reference for all intents and purposes. It appearing to the Court that the verdict of the jury was for the Defendant an against the Plaintiff, Judgment should be rendered upon the verdict in favor of the Defendant and against the Plaintiff.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the Plaintiff, Jerry Lokay, take NOTHING by reason of this suit, and that Defendant, American Real Estate Corporation, be in all things discharged.

It is further ORDERED that all costs of Court are taxed against the Plaintiff for which let execution issue.

All other relief not expressly granted herein is DENIED.

Signed this 29 day of JUNE, 1992.

/S/ Donald J. Floyd
JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

/S/ KENT M. ADAMS
KENT M. ADAMS
KEVIN M. FULLER
ATTORNEYS FOR DEFENDANT,
AMERICAN REAL ESTATE CORPORATION

/S/ DONALD E. SAMPLE
DONALD E. SAMPLE
ATTORNEY FOR PLAINTIFF,
JERRY LOKAY

Filed 11:40 o'clock A.M., July 13, 1992, John S. Appleman, Clerk, District Court of Jefferson Co. Texas

Excerpt, Hearing on Jerry Lokay's motion to admit testimony

THE COURT: Okay. Mr. Sample, do you want to make your motion at this time?

MR. SAMPLE: Yes, sir. Your Honor, plaintiff now comes and files its Motion for Permission for Leave of Court To Supplement Designation of Fact Witnesses, Designation of Witnesses, under the provisions of Rule 166b Paragraph 6, specifically relating to the witnesses Trooper Ross Cox and Mrs. M. L. Nixon.

In support of this motion, Your Honor, we would show that in response to interrogatories, the designation was made that the investigating officer would be a fact witness, and that when the specific name and address of the investigating officer was learned a notice of deposition

was sent to opposing counsel. And in that deposition, the name and address of the witness was provided, and, in addition, a specific statement was made that this witness would testify in the above entitled and numbered cause.

And we would submit, Your Honor, that, in that situation, there certainly is good cause to believe that competent counsel on the other side would understand that witness in this case, that there cannot be any ambiguity as to whether or not that witness would be called to testify in the case.

And we would request, in this respect, that the witnesses with respect to Trooper Ross Cox and Mrs. M. L. Nixon, and to use their testimony by way of deposition.

And in support of the motion, Your Honor, I would submit copies of the notice of deposition as a part of this motion.

THE COURT: Okay.

MR SAMPLE: (Tendering).

THE COURT: Any response, Mr. Fuller or Mr. Adams?

MR. ADAMS: Yes, Your Honor. Kent Adams for the defendant, American Real Estate.

Your Honor, the defendant submitted interrogatories to the plaintiffs in the usual course of litigation. Interrogatory No. 15 asked for the names, addresses, field of expertise and a brief description of the testimony of all expert witnesses. The only expert witnesses ever listed in response to Interrogatory No. 15 were four doctors, Marshall Hayes, Carl Richardson,

Edward Dominques and Joe Lomba.

Interrogatory No. 15, Your Honor, requested the names and addresses of person with knowledge of relevant facts and a brief description and the nature and source of such person's knowledge.

The only response was a listing of names. The only reference at all to the police officer was "investigating officers." And in Mr. Sample's supplement of July of '91 there is no mention whatsoever of Officer Cox.

The Supreme Court of Texas, in Sharp vs. Broadway National Bank, which is at 784 S.W. 2d, 669, per curiam opinion, held that the absence of surprise, unfairness, or ambush does not alone satisfy the good cause exception to the sanction of automatic exclusion...

Your Honor, we would ask that the witnesses be excluded...

THE COURT: The Court is going to stand by its original ruling, based on the Sharp vs. Broadway National Bank and also on the recent case of Alvarado vs. Farah Manufacturing Company, which is a 1992 Supreme Court case.

MR. ADAMS: Thank you, Your Honor.

MR. SAMPLE: Then I have one additional motion to make.

THE COURT: Yes, sir.

PLAINTIFF'S MOTION FOR CONTINUANCE

MR. SAMPLE: Comes now plaintiff and moves the Court for a continuance in this case until June 18th, or the first day thereafter in which to supplement the interrogatories. And in this connection,

I would point out to the Court that this case is on the Court's June docket for trial as well as at this time...

THE COURT: I'll deny the continuance at this time.

Excerpt from hearing on second motion to admit evidence and for continuance

THE COURT: Okay. I will stand by my original ruling based on the cases cited.

MR. SAMPLE: Your Honor, then, in addition, Your Honor, we would reurge the Motion for Continuance as is suggested in Alvarado, by the Supreme Court where you have the discretion to grant a continuance to prevent just this type of injustice, where more or less you have a reverse gamesmanship.

This is not a situation where anybody is trying to sandbag these folks. On the contrary, it's more of a situation where, if anything, they're trying to take advantage, at the expense of Mr. Lokay, of a very technical point in the rule, where everybody knew that this was going to come

int. The Supreme Court suggests in the Alvarado case that one of the ways the Court could prevent that type of injustice is to grant a continuance.

I have reurged the motion to grant the continuance for 30 days. If there is a problem with a vacation I will take whatever date we can get in the Court. I will offer to the Court that we will pay amount of money that it costs for them to have their people here today. And preparation for trial, it's not as if they are going to have to go back and completely re-prepare for trial.

But I think that would be a proper ruling by this Court, or a proper exercise of discretion to prevent a terrible injustice in this case.

...

MR. ADAMS: ... Mr. Sample's remedy is an appeal if they think the Court is ruling -- I have been on the opposite end of that. It's not like he is without a remedy. Mr. Sample's remedy for that is an appeal.

MR. SAMPLE: Well, of course, we can talk about an appeal, Judge, but we also have a plaintiff here who is waiting to have his case tried. Now, the possibility would be that if the case were continued and we did the supplementation, we would never have to have a need for an appeal by anybody because we would get past the technical point of "did you draw up a piece of paper that had a correct title on it and put in specific information," and get down to the facts of the case. Whereas, where we're heading right now is

obviously somebody is going to appeal.

...

THE COURT: Okay. I will deny the motion for continuance.

Excerpt, Notice of Oral Deposition,

Ross J. Cox, Jr.

"...The oral deposition of Ross J. Cox, Sr., C/O Department of Public Safety, 1735 North Washington, Livingston, Texas, to testify in the above entitled and numbered cause, which will be taken at the County Courthouse of Polk County, Texas, Second Floor, Livingston, Texas at 11:00 a.m. on September 19, 1991. (Notice of Oral Deposition, Ross J. Cox, Tr. Vol. 1, Pg. 27).

Excerpt, Notice of Oral Deposition,
Mrs. M. L. Nixon

"...The oral deposition of Mrs. M.L. Nixon, Route 4, Box 1008-B, Livingston, Texas 77351, to testify in the above entitled and numbered cause, which will be taken at the County Courthouse of Polk

County, Texas, Second Floor, Livingston, Texas at 10:00 a.m. on September 19, 1991. (Notice of Oral Deposition, M.L. Nixon, Tr. Vol. 1, Pg. 28).

Excerpts, Deposition Testimony of Trooper Ross Cox, Jr.

"Q. When you investigated the accident, did you check the condition of the vehicle?

"A. How do you mean?

"Q. Well, for instance, the tires, what was the condition of the tires?

"A. Yes, sir, I marked on my report that the tires were slick.

"Q. Okay.

"A. That was pretty easy to do being how it was upside down, looked right at them."
(See SF 125-126)

"Q. Was there water standing on the road?

"A. I can't remember, sir.

"Q. What speed would have been prudent

under those conditions?

"A. Oh, I couldn't tell you that, sir. A safe speed, I can't give you a number, but I felt that it should have been under the limit.

"Q. But if it was under the limit, you can't tell us how much under the limit it should have been?

A. No, sir." *(See SF 131)*

Excerpts, Deposition Testimony of Mrs. M. L. Nixon

"Q. As you passed her, was there any cars, oncoming traffic as you passed?

"A. No, none at all, none at all.

"Q. You were saying you saw in your rearview mirror a red truck?

"A. Yes, sir.

"Q. Tell me what you saw.

"A. I saw that he was driving to try to pass her just like I did, and what thought come in my mind was, I hope she doesn't swerve over that way because he would have been behind me you see, and I didn't know whether he knew that she was swerving that way or not. So I looked in my rearview mirror and I saw him coming around, and then I looked back to the road to keep my

car on my side of the road, looked back in the mirror, and when he was coming around, his left wheel got off the road and it just kept going, it wouldn't come back, it kept on going to the left and he went off the road and hit that culvert. And when I looked back again, he was flipping, the car was back again and I saw the fire coming out, and I immediately pulled into the next driveway so that I could have someone call for help out there. And I told my granddaughter, I said--I said, honey, you are going to miss your appointment, I said, because this is going to take time, and she said, that's okay, grandma.

"Q. Based on what you saw, did it appear to you that the truck's tire went off the pavement to the left because the truck

just went a little too wide around the car?

"A. No. No, because there was plenty of room, when I looked, there was plenty of room for him to come back. The car--see, she just swerved just like--if she swerved now, and I figure she did because she was doing it to me. But she would just swerve, just to get close to that yellow line and then she would come back. So I figured that's what had happened. And when she--when he--when I looked in that rearview mirror and saw him, there was plenty of room there for him to have, you know, come back on the road. Q. I just have one more. Just I want to ask you, Mrs. Nixon, in listening to you talk about the little old lady in the other car, talking about it swerve, I see you

describing it with your hands, it's like a gentle drift, would that be a good way to describe it?

"A. Yes. Yes. Yes. *(See SF 132-136).*

"Q And can you tell me what you saw as you turned off of 943 onto 146 as you traveled towards Livingston?

"A Okay. We were following an elderly lady in a car, a light colored car, and she would speed up anytime that i could pass her, and she would slow down when I couldn't. And I was trying to get my granddaughter into an appointment for having her hair fixed because she was going to be married. And she -- I kind of got aggravated. When I got to this spot in the road, I don't know what the name of that section is there, but there is a

little barbeque place on the right going up the hill. And anyway, she had -- she wasn't driving but about thirty-five or forty miles an hour, she wasn't driving over forty because I had to go forty to go passed her..." *Deposition of Mrs. M. L. Nixon, page 5, line 15 through page 6, line 6.*

Supreme Court, U.S.
FILED
JUN 2 1994
OFFICE OF THE CLERK

No. 93-1827

In The

Supreme Court of the United States

October Term, 1993

JERRY LOKAY,

Petitioner,

v.

AMERICAN REAL ESTATE CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth District Of Texas

BRIEF OF RESPONDENT, AMERICAN REAL ESTATE CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-1827

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BRIEF OF RESPONDENT, AMERICAN REAL ESTATE CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, AMERICAN REAL ESTATE CORPORATION ("AREC"), prays that the Petition for Writ of Certiorari to the Court of Appeals for the Ninth District of Texas be denied.

OPINIONS BELOW

Petitioner's Appendices set forth the relevant opinions of the courts below.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Due Process Clause, U.S. Constitution, Amendment XIV, Section 1: " . . . ; nor shall any State deprive any person of life, liberty or property without due process of law; . . . "

RULE 215(5) Texas Rules of Civil Procedure: "Failure to Respond to or Supplement discovery. A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the Trial Court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record."

STATEMENT OF THE CASE

Petitioner Lokay, a realtor employed by Respondent, AREC, borrowed the company pick-up truck for personal use on his day off. Petitioner was injured in a one (1) vehicle accident which occurred while he was driving.

Prior to the commencement of evidence at trial, Respondent moved in Limine to exclude the testimony of any witnesses not properly disclosed more than thirty (30) days before trial, as required by Rule 215(5) of the Texas Rules of Civil Procedure. Petitioner had never supplemented his discovery responses to list Ross Cox or Mrs. M.L. Nixon as witnesses. The motion was sustained after a "good cause" hearing was held, and as a result, witnesses Cox and Nixon were excluded.

PROCEEDINGS AT TRIAL

Subsequent to the Court's ruling on the Motion in Limine, evidence was presented to the jury, arguments were had and a defense verdict resulted. A Judgment on the verdict was duly entered.

PROCEEDINGS FOLLOWING TRIAL

Petitioner filed a motion for New Trial which was denied. Petitioner appealed to the Court of Appeals for the Ninth District of Texas and the Judgment of the Trial Court was affirmed. Petitioner applied for Writ of Error to the Texas Supreme Court and for rehearing. Both were denied. All of Petitioner's post trial motions focused on

the exclusion of the referenced witnesses and all said post trial motions and appeals were denied.

REASONS FOR DENYING THE WRIT

Not unlike Rule 26(3) of the Federal Rules of Civil Procedure, Rule 215(5) of the Texas Rules of Civil Procedure requires disclosure of witnesses at least thirty (30) days before trial. Unlike the Federal Rule, Texas Rule 215(5) does not require unilateral disclosure, but only requires disclosure in response to a discovery request. The sanction in either case is the same – exclusion of the non-disclosed evidence or witness. Rule 37(c)(1), Fed. R. Civ. P.; Rule 215(5) Tex. R. Civ. P. The Federal rule allows an exception for failure to disclose based on "substantial justification". Rule 37(c)(1), Fed. R. Civ. P. The Texas rule allows an exception for failure to disclose based upon good cause shown. Rule 215(5), Tex. R. Civ. P. Rules such as these are designed to streamline litigation, reduce costs, insure prompt and just resolution of disputes and encourage full disclosure.

During the course of discovery, Respondent served interrogatories on Petitioner. Interrogatory No. 16 inquired as follows:

> "Please state the names and addresses of all persons known by you or your attorneys to have knowledge of any fact relevant to the matters or incidents complained of in your suit, together with a brief description of the nature and source of such person's knowledge." (Tr. Vol. 1, p. 15).

Plaintiff answered the interrogatory as follows:

> "Sandy Lokay, Jerry Lokay; they were in the wreck; investigating police officers, ambulance personnel and wrecker (sic), Travellers (sic) Insurance adjuster, American Real Estate, treating physicians; Joseph Caraway; Jodi Caraway; Juanita Dorothy R. Heel; Brenda Arena; Judy Hargrove, Bill Christian; Gerald Farhah (sic); Lori Millicent." (Tr. Vol. 1, p. 25).

At trial, Petitioner attempted to call Ross Cox and Mrs. M.L. Nixon by deposition. These witnesses were not disclosed in response to the referenced interrogatory. Pursuant to the Court's ruling in Limine, the witnesses were excluded.

Petitioner did not deny knowledge of the rule or his lack of compliance. Petitioner claims instead that the rule is unfair. This is the thrust of Petitioner's plea.

The application of the rule by the Court did not result in a denial of due process under the U.S. or Texas Constitutions. Petitioner claims the "good cause" hearing conducted by the Court violated his rights under the 14th Amendment to the U.S. Constitution. Assuming arguendo that Petitioner can establish a protected interest and entitlement to a hearing, due process of law requires only some kind of hearing prior to deprivation of a significant property interest. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 19, 98 S.Ct. 1554, 1565, 56 L.Ed.2d 30 (1978). A hearing was had, in fact several hearings were had, before and during the trial in question on the issue of exclusion of witnesses Cox and Nixon. Petitioner sets out in his appendix a partial transcript of the initial hearing on the exclusion of the witnesses in

question. There is no doubt Petitioner was afforded a hearing at a reasonable time presided over by the trial judge before the witnesses in question were excluded. Petitioner failed to establish good cause for the lack of disclosure. There was no "automatic" exclusion of evidence, as argued by Petitioner. Exclusion was ordered only after Petitioner had his opportunity to be heard and failed to establish good cause.

Petitioner additionally argues that because the witnesses in question had been deposed by Respondent, they were therefore "disclosed". This issue has been litigated before, and the Texas Supreme Court has spoken:

> A party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory. Thus, even the fact that a witness has been fully deposed, and only his or her deposition testimony will be offered at trial, is not enough to show good cause for admitting the evidence when the witness was not identified in response to discovery.

Sharp v. Broadway National Bank, 784 S.W.2d 669, 671 (Tex. 1990).

The Court properly applied Rule 215(5) to this case. Due process does not mandate a favorable result to Petitioner, rather it requires a fair and reasonable opportunity to be heard. Petitioner, not due process, must supply the good cause. Where good cause is not established, the rule provides that the witnesses are to be excluded. The Court's ruling was correct.

CONCLUSION

Petitioner had notice of the rule and failed to comply. Petitioner failed to establish good cause and the rule's sanctions were applied. Due process was not violated. Petitioner's witnesses were not "silenced" by the Court, but by counsel's non compliance with the rule. Petitioner's due process rights were amply protected and therefore, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 93-1827

In The

Supreme Court of the United States

October Term, 1993

JERRY LOKAY,

Petitioner,

v.

AMERICAN REAL ESTATE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Ninth Court Of Appeals District Of Texas

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June 29, 1994

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No. 93-1827

In The

Supreme Court of the United States

October Term, 1993

JERRY LOKAY,

Petitioner,

v.

AMERICAN REAL ESTATE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Ninth Court Of Appeals District Of Texas

PETITIONER'S REPLY BRIEF

Respondent's arguments highlight why this Court should grant the petition. Equating the automatic exclusion under Texas Rule of Civil Procedure 215(5) with the sanction provided under Federal Rule of Civil Procedure 37(c)(1), Respondent fails to recognize the differences in standards between the Texas rule and the Federal rule. The use of automatic discovery sanctions will generate considerable nationwide controversy as more state courts adopt variations of Federal Rule 37(c)(1) as Texas has already done. How Due Process limits the use of these automatic discovery sanctions remains the question to be answered in this case. This Court has the opportunity to provide guidance to the courts of the various states in

formulating their procedural rules in a manner consistent with Due Process.

I. The Court Should Grant The Petition To Clarify What Due Process Limitations Exist As To Automatic Discovery Sanctions As This Issue Will Generate Nationwide Controversy In The Federal And State Courts.

Effective December 1, 1993, this Court adopted significant new amendments to the Federal Rules of Civil Procedure. Among these amendments, Rule 37(c)(1) Fed. R. Civ. P. now provides for a self-executing sanction preventing a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed or supplemented as required by Rule 26 Fed. R. Civ. P. (General Provisions Governing Discovery). However the Rule contains the following exception: " . . . *unless such failure is harmless.*" Rule 37(c)(1) Fed. R. Civ. P. [emphasis added]. The Committee Notes of the Advisory Committee on the Civil Rules point out that "[l]imiting the automatic sanction to violations 'without substantial justification,' coupled with the exception for violations that are 'harmless,' is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures." See Notes of the Advisory Committee on the 1993 Amendment to Rule 37 [referring specifically to Rule 37(c)(1)].

In contrast, the express language of the Texas Rule 215(5) authorizes the trial court to impose a single sanction (exclusion of testimony). The good cause exception has been strictly limited by the Texas Supreme Court. "Good cause" is not lack of surprise, or lack of prejudice, uniqueness of evidence, or a fully deposed witness. *Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911, 915 (Tex. 1992). To the contrary, the Federal Courts have held that a plaintiff's good-faith oversight in failing to supplement discovery did not warrant the sanction of precluding eyewitness testimony. See *Outley v. City of New York*, 837 F.2d 587, 590 (2nd Cir. 1988); *accord Murphy v. Magnolia Electric Power Association*, 639 F.2d 232 (5th Cir. 1981). "Considerations of fair play may dictate that courts eschew the harshest sanctions . . . where failure to comply is due to mere oversight of counsel amounting to no more than simple negligence." *Outley v. City of New York*, 837 F.2d at 591; *c.f. Cine Forty-Second Street Theatre Corp. v. Allied Artists Picture Corp.*, 602 F.2d 1062, 1068 (2nd Cir. 1979). Rule 37(c) also allows the trial court to impose sanctions other than exclusion ("in lieu of or in addition to"). See Rule 37(c) Fed. R. Civ. P. Accordingly, significant differences exist between the Federal and Texas rule despite Respondent's assertions to the contrary.

Most states have a history of patterning state rules after the Federal civil procedure rules. Logically, it may be inferred that courts of various states will experiment with automatic discovery sanctions, as Texas has done. This Court has a great opportunity to provide guidance to these state courts to promulgate rules which will be consistent with Due Process.

II. The Court Should Grant The Petition To Clarify The Standard Of Due Process As Applicable To Sanctions Of Automatic Exclusion Of Evidence Under Federal And State Procedural Rules

Petitioner's claim in this petition centers on a procedure which can be invoked at any stage of the proceedings, without prior notice to the Petitioner, that automatically excludes crucial evidence, with no discretion of the court and no other choice of sanctions. "Mere legislative fiat may not take the place of fact in the determination of fact in the determination of issues involving life, liberty or property." *Manley v. Georgia*, 279 U.S. 1 (1929).

Petitioner's claim is more than a mere cry of "it's not fair." The Texas procedural rule provides:

> A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

Tx. R. Civ. Proc. 215(5).

Thus the typical good cause hearing begins with the requirement that evidence must be excluded. There is no discretion of the court and no lesser sanction provided. *Alvarado v. Farah Manufacturing Co., Inc.* 830 S.W.2d 911,

914 (Tex. 1992). Where the information was disclosed, the question then centers on whether it was done in a particular manner. If it was not done in a particular manner, the sanction is still automatic; the presumption is that the evidence must be excluded. Texas Rule 215(5) provides only one sanction, and the courts are not free to disregard its language. *Alvarado*, 830 S.W.2d at 915. To overcome the presumption that the evidence must be excluded, Petitioner must establish "good cause sufficient to require admission of the evidence." However, under the Texas rule this is an unduly onerous burden, if not an impossible one. The rule itself is silent in defining "good cause." Thus Petitioner is without notice of what is sufficient to carry the burden of establishing that the evidence must be admitted. Moreover, the Texas Supreme Court has not defined the term "good cause sufficient to require admission." A party must necessarily guess at its true meaning and argue for admission of the evidence anyway.

Contrary to the Respondent's assertion, the "good cause" hearing did not satisfy Due Process. "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment." *Western & A.R. Co. v. Henderson*, 279 U.S. 639, 642 (1929). The operation of Texas Rule 215(5) violates the due process clause of the 14th Amendment because the presumption, automatic exclusion of evidence, together with the failure to define what constitutes "good cause" under the rule "operates to deny a fair opportunity to repel" the presumption. Petitioner was effectively without notice of what was

necessary to repel the presumption of automatic exclusion.

"The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing'." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). When disclosure is made, but the question centers on the manner of disclosure, the party opposing the introduction of evidence should object in advance of trial to give sufficient notice to permit adequate preparation for a hearing on the imposition of sanctions. However, under the operation of Texas Rule 215(5), the exclusion of crucial evidence can be obtained moments before trial, without prior notice, as in Lokay's case. The exclusion is not based on the probative value of the evidence, nor its reliability, nor upon any consideration whether there has been any harm to the opposing party, but only on the basis of an automatic sanction. It is inflexible in its operation, and unjust in its effect on the litigant's right to present all of the evidence supporting his claim for a decision on the merits.

In the *Memphis Light* case, Mrs. Craft had numerous talks with officials of the power company to prevent a utility termination, but the cut-off procedure was held unconstitutional because of lack of notice of the availability of a method to protest the company's action. In Lokay's case, while a "good cause" hearing occurred, it was meaningless, because the standard of "good cause sufficient to require" admission of the evidence is not defined. By the continuing litigation over the years in which the Texas Supreme Court has failed to define the term in more than ten cases in which it has heard the

issue, it is clear that the term "good cause" used in Texas Rule 215(5) is one that "[M]en of common intelligence must necessarily guess at its meaning and differ as to its application. . . . " *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964).

A hearing without meaning does not satisfy Due Process. To satisfy the mandates of the Due Process clauses of the Fifth and Fourteenth Amendments, a party must be afforded a hearing "at a meaningful time and in a meaningful manner." A hearing without prior notice sufficient to permit adequate preparation, and without notice of a defined standard which must be met in order to repel a presumption or to obtain relief, is meaningless, and amounts to a denial of Due Process.

Discovery sanctions must comport with requirements of Due Process. *Societe Internationale v. Rogers*, 357 U.S. 197 (1958). The Texas Rule 215(5) does not. It permits surprise attacks to exclude crucial evidence. It creates a presumption which requires exclusion of evidence that under the Texas case decisions is virtually irrebuttable. It permits important claims to be decided, not on the merits of the case, but on the basis of an inflexible procedural rule. The attempt to afford a "good cause" determination does not afford a meaningful hearing at a meaningful time.

The history of sanction litigation in Texas demonstrates that unless clear definition is given to establish Due Process requirements, sanction litigation in the Texas courts will become a model of continuing injustice. Moreover, since many states model their procedural rules after federal rules of procedure, the availability of sanctions, particularly those of automatic operation, will have a

great effect on the rights and claims of litigants in the nation. Texas has found the effect. "The greater availability of sanctions began to shift the focus of litigation away from trial of the merits of the case and toward pretrial accusations of rules violations. Rather than simply assuring more careful compliance with rules to achieve a better adjudication of case before juries, sanctions litigation commanded an entire arena of its own, often wholly unconnected with the merits of the case, yet influencing its outcome." Hon. Nathan L. Hecht, *Foreword to Avoiding Sanctions: Trying to Dodge the Bullet*, 25 Texas Tech Law Review 1 (1993).

The operation of Texas Rule 215(5) is a model of continuing injustice. It denies Due Process. This Court now has the opportunity to clarify the standard of Due Process as applicable to sanctions of automatic exclusion of evidence, and to provide a model of justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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